IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 01.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.Nos.743 of 1997

L.Bashyam .. Appellant/Defendant

vs.

1.B.Muthulakshmi
2.B.Rangammal
3.B.Nirmala
4.B.Lakshminarayanan
5.B.Chenchulakshmi
6.B.Mohana
7.B.Srinivasan
8.B.Jayaraman
9.B.Narayanan .. Respondent/(Plaintiffs 2 to 10)

Prayer: This second appeal has been preferred u/s 100 CPC against the decree and Judgment dated 06.03.1996, made in A.S.No.226 of 1995, on the file of the VI Additional Judge, City Civil Court, Chennai, confirming the decree and judgment dated 10.02.1993 made in O.S.No.291/1986 on the file of the XII Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.N.Muninarayanan
For Respondents : Mr.S.Thiruvengadasamy
(For R1,R4,R7 to R9)

JUDGMENT

This second appeal has been preferred against the decree and Judgment in A.S.No.226 of 1995 on the file of the VI Additional Judge, City Civil Court, Chennai. The defendant, who has lost his defence before the Court below is the appellant herein. The suit is filed by the plaintiff for recovery of possession of the plaint schedule property which is 600 sq ft in Door No.16 comprised in R.S.No.1872/1 in Ranganathapuram Street, Mylapore.

2. The averments in the plaint for the purpose of deciding this appeal sans irrelevant particulars are as follows:-

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The plaint schedule property belongs to the plaintiffs. The Door No.18 (old NO.12/1) in Ranganathapuram Street, Mylapore, also belongs to the plaintiffs. The first plaintiff was residing with the defendant in Door NO.18 Ranganathapuram Street, Mylapore, Chennai-4. In the year 1977 the first plaintiff permitted the defendant to occupy a room situated in Door NO.16, Ranganathapuram Street, Mylapore, which is adjacent to Door No.18. The said room measures about 6 feet x 10 feet with an extent of 60 sq ft with a zinc sheet roofing. The said room was attached to the superstructure in Door No.18, Rnaganathapuram Street, Mylapore, Chennai-4. On 9.3.1970 the first defendant has executed a settlement deed in favour of the defendant in respect of Door No.18, Ranganathapuram Street, Mylapore. The said settlement deed was obtained by the defendant when the first plaintiff was under the influence of alchol, misrepresenting him that it was a power of attorney and the said matter is the subject matter of a separate legal proceedings. In or around 1978 the first plaintiff left the defendant and joined with his son's family viz. the plaintiffs 2 to 10 and also requested the defendant to vacate and deliver vacant possession of the room referred to above in the suit property. The defendant failed to comply with demand inspite of the repeated remainders inclusive of letter dated 18.1.1985. The room in occupation of the defendant is capable of fetching a rent of Rs.150/- per month and the plaintiffs claim as damages for use and occupation only a sum of Rs.60/- per month for three years preceeding the date of plaint. The damages for use and occupation for the period from 20.12.1982 to 20.12.1985 comes to Rs.2,160/-. Hence, the suit.

3. The defendant has filed his written statement contending as follows:-

The house and ground bearing No.16, Ranganathapuram Street, Mylapore, Chennai, belongs to the plaintiffs and house and ground bearing No.18 was settled absolutely in favour of the defendant by the plaintiff and the property is absolutely in the possession and enjoyment of the defendant ever since the settlement. The said property was settled on the defendant by the plaintiff on 9.3.1970 and there is another release deed dated 27.3.1975 which was executed by the first plaintiff in favour of the defendant transferring his right to collect rents. The first plaintiff has lost all his rights in respect of the property in respect of door No.18, Ranganathapuram Street, Mylapore. The defendant is residing in door No.18, Ranganathapuram Street, for the past more than 20 years. Therefore, the defendant was not in occupation of the alleged room situated at door No.16, Ranganathapuram Street, Mylapore. Therefore, the question of the plaintiff having permitted the defendant to occupy a room in No.16, Ranganathapuram Street in the year 1977. There is no such room measuring 6 feet x 10 feet with tiled roofing attached to the superstructure in door No.18, Ranganathapuram Street, Mylapore. The settlement deed dated 9.3.1970 will conclusively prove the right and title of the defendant in respect of door No.18. The defendant is a foster son

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of the first plaintiff and he is not in occupation of the plaintiffs' property much less the suit property. The defendant has not received any letter dated 18.1.1985 calling upon the defendant to quit and deliver vacant possession. The suit is not maintainable since he has also bequeathed the property to his grand children. Only at the instance of his grand children the suit has been filed by the first plaintiff. The plaintiffs have filed O.S.No.7897 of 1978 and A.S.No.243 of 1985 and the same were ended in favour of the defendant. Only to harass this defendant the present suit has been filed by the plaintiffs. There is no such suit property as described in the plaint schedule. The defendant is not in occupation of the plaintiff's property much less the suit property. There is no question of the defendant paying any damages. The present suit is vexatious in nature because after the dismissal of A.S.No.243/1985 on 30.9.1985 this suit has been filed by the plaintiffs. Hence, the suit is liable to be dismissed.

4. In the additional written statement the defendant would claim that in view of the dismissal of the suit filed by the plaintiffs in O.S.No..7897 of 1978, the present suit is bared under Order 2 Rule 2 of CPC and also bared under the principle of resjudicata and estopel. The appeal in A.S.No.243/1985 preferred against the decree and judgment in O.S.NO..7897 of 1978 was also dismissed. The Court fee paid on the plaint is not correct. Hence, the suit is liable to be dismissed with costs.

5. On the above pleadings the learned trial judge has framed 7 issues for trial. P.W.1 was examined and Ex.A.1 to A4 were marked on the side of the plaintiffs. D.W.1 was examined and Ex.B.1 to B.7 were marked on the side of the defendant. A Commissioner was appointed in this case and he has filed his report Ex.C.1 and plaint Ex.C.2.

6. On the basis of the evidence both oral and documentary the learned trial Judge has come to the conclusion that the plaintiffs are entitled to the decree as prayed for with costs and accordingly decreed the suit with costs. Aggrieved by the findings of the learned trial Judge, the defendant preferred an appeal in A.S.No.226/1995 before the VI Additional Judge, City Civil Court, Chennai, who after elaborate deliberation has concurred with the findings of the learned trial Judge and dismissed the appeal. Hence, the defendant is before this Court by way of second appeal.

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7. The following substantial questions of law have been framed in this appeal:-

> i) Whether the Courts below legally right in not upholding the claim of this appellant that the suit was hit by Section 11 of CPC on the ground that the decision in O.S.No..7897/1978, City Civil Court, Chennai, would bind the parties in this suit?

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ii) Whether the judgment and decree of courts below legally right in not upholding the defence of the appellant that the suit was hit by Order 2 Rule 2 of CPC?

iii) Whether the judgment and decree of the courts below is legally sustainable when they held that the principle boundary will prevail over extent also in respect of properties dealt with under settlement deed and not restricted to sale deeds alone?

8.The Points:-

8(a) The son of the first plaintiff viz. Balakrishnan had filed O.S.No.7897/1978 against the defendant Bashyam. The first plaintiff herein was arrayed as D2 in the said suit. Ex.B.1 is the copy of the plaint. The plaint schedule to Ex.B.1 will go to show that, that suit is in respect of Door No.18 (old No.12/1) in Ranganathapuram Street, Mylapore, which is situated east of plaintiff's property in door No.16 which is the present plaint schedule property. The present plaint schedule is a portion of door No.16 measruing about 60 sq.ft. The plaintiffs admit that Ex.A.2-settlement deed was executed by the first plaintiff Loganathan Pillai in favour of the defendant in respet of door No.12 new door No.18 in respect of 600 sq.ft. Challenging Ex.A.2 the first plaintiff's son Balakrishnan has filed Ex.B.1-suit, which was dismissed as seen from Ex.B.4 and it is also admitted by both parties. The appeal over the decree and judgment in O.S.No..7897/1978 was also dismissed. So far as Ex.A.2-settlement deed in respect of Door NO.18 is concerned finality has been reached in favour of the defendant under Ex.B.4-suit. The present suit is in respect of door No.16. The case of the plaintiff is that a portion viz. 6 ft x 10 ft = 60 sq ft in Door No.16 was in the permissible occupation of the defendant and that after issuance of Ex.A.3-notice dated 4.1.1985 the said permission has been revoked and now the plaintiff has come forward with this suit for recovery of possession of the plaint schedule property which is measuring about 60 sq ft in Door No.16.

8(b) The learned counsel appearing for the appellant would contend that under Order 2 Rule 2 of CPC, this suit is not maintainable because in the earlier suit in Ex.B.4-suit, the plaintiff has not asked any relief in respect of the plaint schedule property, which is admittedly in the occupation of the defendant. This contention of the learned counsel for the appellant cannot be upheld because the earlier suit Ex.B.4 is in respect of Door No.18. But the present suit is in a portion of Door No.16. The learned counsel would raise a contention that the plaint schedule property will form part of door No.18. To test whether the plaint schedule property will come within the boundary of door No.18 or it comes within the boundary of door No.16, a Commissioner was appointed before the trial Court and the Commissioner has also filed Ex.C.1 report

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and Ex.C.2 plan. The defendant, as D.W.1, has admitted in the cross-examination that he is only in occupation of the plaint schedule property with the permission of the first plaintiff. A perusal of Ex.C.2-Commissioner's plan will go to show that the defendant is in possession of about 26 feet 11 inches on the Eastern side of his Door No.18. As per Ex.A.2 the defendant is entitled to 20 feet on the Eastern side of door No.18. In Ex.C.2 the measurements are shown as follows:- 13 feet 2 inches + 11 feet 2 inches + 2 feet 7 inches. So the total extent come to 26 feet 11 inches. The disputed portion ie., the suit property has been shown in Ex.C.2 marked as zebra cross lines the width of the said property is shown as 6 feet on the East 6 feet on the South and 9 feet 6 inches on the West and East. But the defendant is in occupation of more than what he is entitled to under Ex.A.2 in respect of the Door No.18 on the Eastern side. So, both the Courts below have come to the correct conclusion that the suit property does not come within door No.18, but it comes only within door No.16. Under such circumstances, I do not find any reason to interfere with the findings of the Courts below, which are neither illegal nor infirm to warrant any interference from this court. Points are answered accordingly.

9.. In fine, the second appeal is dismissed confirming the decree and judgment in A.S.No..226 of 1995, on the file of the VI Additional Judge, City Civil Court, Chennai, with costs.

ssv

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To,

1. The Registrar, City Civil Court,
Chennai.

2.The VI Additional Judge,
City Civil Court, Chennai.

3. The XII Assistant Judge,
City Civil Court, Chennai.

4. The Section Officer, V.R. section, High Court,
Chennai.

+ One cc to Mr. N. Mani Narayanan, Advocate SR 13199

+ One cc to Mr. S. Thiruvenkaraswamy Advocate SR 12692

JRG (co)

sg 9/4/07

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